APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No: 98-593-Civ-J-16A

CARMEN PERILLO, STEPHEN DAUTEL, GERALD HARDY, WILLIAM BROWN, J. ELAINE BROOM, and JOANN KOTCHKOWSKI, on behalf of themselves and all others similarly situated,

Plaintiffs

v.

AT&T CORP.,

Defendant

PLAINTIFFS' EMERGENCY MOTION TO DECLARE LOCAL RULE 4.04(e) IN FACIAL VIOLATION OF THE RIGHT TO SPEECH AND ASSEMBLY AND RIGHT TO ACCESS TO COURTS

Plaintiffs, Carmen Perillo, Stephen Dautel, Gerald Hardy, William Brown, J. Elaine Broom, and JoAnn Kotchkowski, on behalf of themselves and all others similarly situated, move this Court to declare Local Rule 4.04(e) of the United States District Court for the Middle District of Florida in facial violation of the right to speech and assembly under the First Amendment of the United States Constitution and the right to access to courts under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Background

Plaintiffs' counsel represent the above named six plaintiffs. In addition, they represent additional individuals

who were salaried management employees for a number of years of: (1) AT&T Solutions Customer Care, Inc., a subsidiary of AT&T Corp. ("AT&T"), prior to its acquisition by MATRIXX Marketing, Inc.; and (2) of AT&T Universal Card Services, Inc., a subsidiary of AT&T, prior to its acquisition by Citibank, N.A. Because of Local Rule 4.04(e), plaintiffs and their counsel has been prohibited from communicating with non-representative or non-named class members since June 19, 1998, the date this action was filed.

Many non-representative class members have made contributions to defray the legal costs of performing the necessary research prior to bringing this litigation. In addition, many have indicated that they desire to continue to financially support the litigation through contributions necessary to pay ongoing costs. However, for various reasons, a number of these individuals did not desire to be named plaintiffs. For example, some individuals were concerned that AT&T's counsel and private investigators would inquire into personal matters for which they had legitimate privacy concerns. Others were willing to contribute financially but were unsure whether they could devote the necessary time involved in serving as a named plaintiff and class representative. Still others thought that because the named plaintiffs were excellent representatives, they would prefer to remain in the background while continuing to contribute financially.

Prior to the filing of this lawsuit a number of meetings took place with the above individuals. The communications that occurred at these meetings were protected by the attorney/client privilege. However, after the filing of this lawsuit on Friday, June 19, 1998, neither plaintiffs' counsel nor the named plaintiffs could attend future meetings. A meeting was held on Thursday, June 25, 1998 and plaintiffs and their counsel could not attend to explain the developments of this past week. This meeting was a particularly crucial one because the price of AT&T stock fell by over twelve percent (12%) this past week

after the acquisition of TCI was announced last Monday in the Wall Street Journal. This decline resulted in a loss in the billions of dollars in the market value of AT&T stock. Many of the class members are substantial shareholders of AT&T.

Most important, Matrixx has been communicating with its managerial employees formerly employed with AT&T Solutions Customer Care about releasing their bridging rights under the Mandatory Portability Agreement and about a reduction in force. Plaintiffs and other management employees formerly employed with AT&T Solutions Customer Care have been presented with a proposal to waive their rights under the Mandatory Portability Agreement, which provides for mutual recognition of service credit and transfer of benefit obligations for certain employees who leave one "Interchange Company" and are later employed by another "Interchange Company." Interchange Companies include AT&T, the RBOCs (i.e. BellSouth) and Cincinnati Bell, Inc., the parent of Matrixx. The proposed release includes, in part, the following language:

> Any and all claims for benefits arising under the Employment Retirement Income Safety [Security] Act ("ERISA"), as amended from time to time, of any sort relating to portability of service with my former, current or future portability employer(s) [or Interchange Companies and certain of their subsidiaries].

Matrixx, has also presented members of plaintiffs' class with a voluntary severance package which requires, as a condition of acceptance, a release of all employment related claims against Matrixx. Curiously, the severance package terminates the employment of those managers who accept as of a date on or after the expiration of the bridging rights period. This means that a Matrixx employee who accepts will most probably be excluded from bridging for a five year period should he or she go to

work for another Interchange Company. If portability were also waived there appears to be no possibility of bridging. This has led to some suspicion that AT&T [1] is intimately involved in Matrixx's voluntary severance package, either through indemnity or as part of the recent sales agreement or both.

Despite all of these critical events affecting members of plaintiffs' class, including events with deadlines that may impact their rights under this lawsuit, the plaintiffs and their counsel cannot respond, advise or communicate with them.

Local Rule 4.04(e) prohibits ongoing communications with these individuals, including about the effect of this litigation on the above matters and requesting additional financial support. It provides as follows:

> In every case sought to be maintained by any party as a class action, all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member, not a formal party to the case, without approval by order of the Court. The communications forbidden by this rule include, but are not limited to, (1) solicitations directly or indirectly of legal representation of actual or potential class members who are not formal parties to the case; (2) solicitations of fees and expenses, or agreements to pay fees or expenses, from actual or potential class members who are not formal parties to the case; and (3) solicitations of request by

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[1] In addition, AT&T mailed on or about the same date as the filing of this lawsuit an offer of a modified early retirement plan to certain former managers of AT&T who were denied the Armstrong Plan but who had bridging rights under the Mandatory Portability Agreement that is available to former employees of AT&T (and other participating companies including three of the plaintiffs' current employer, Matrixx) who were employed at the time of divestiture in 1983.

class members to opt out in class actions under Rule 23(b)(3), Fed. R. Civ. P.

Argument

Local Rule 4.04(e) is in facial violation of the First Amendment to the United States Constitution. *See Gulf Oil Co. v. Bernard,* 452 U.S. 89 (1981). In that case, the United States Supreme Court found an order prohibiting communication with class members to be an abuse of discretion and held:

> The order interfered with their efforts to inform potential class members of the existence of this lawsuit, and may have been particularly injurious—not only to respondents but to the class as a whole—because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts. In addition, the order made it more difficult for respondents, as the class representatives, to obtain information about the merits of the case from the persons they sought to represent.
>
> Because of these potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.

Id. at 101-02 (footnotes omitted)

Local Rule 4.04(e) presents a blanket prohibition on plaintiffs' rights to speech and assembly under the First Amendment. The Local Rule is not narrowly tailored. In addition, Local Rule 4.04(e) is a prior restraint that could be justified only under the most exceptional circumstances, none of which are present here. The combination of the blanket prohibition and the prior restraint makes Local Rule 4.04(e) an anachronism to the days of King George III. Such a federal governmental prior restraint on speech and assembly is exactly what Thomas Jefferson believed the First Amendment was designed to protect against. Article III courts are subject to the First Amendment.

In light of *Gulf Oil Co. v. Bernard*,[2] and the fact that the Local Rule is administrative in nature, if a Florida

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[2] The Supreme Court affirmed the United States Court of Appeals for the Fifth Circuit's en banc judgment. Judge Godbold who wrote the majority en banc opinion, and who had dissented in the panel opinion, went further than the Supreme Court's affirming opinion and "held that the order was an unconstitutional prior restraint on expression accorded First Amendment protection." *Id.* at 98. *See Gulf Oil Co. v. Bernard*, 619 F.2d 459 (5th Cir. 1980) (en banc). The Supreme Court noted: "In holding that the order restricted protected speech, the court relied both on cases involving essentially political litigation. *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963);" *Gulf Oil Co.*, 452 U.S. at 99 n.9.

While the 1980 pre-split Fifth Circuit en banc opinion may not be binding on the Middle District of Florida because of the Supreme Court's affirmance of judgment, this Court should certainly consider the analysis and rationale contained in the en banc majority opinion. Even a cursory reading of this 1980 en banc majority opinion should have given the Middle District of Florida pause before it amended Local Rule 4.04 effective February 1, 1995. The district court's order held unconstitutional by the en banc Fifth Circuit contained language virtually identical to Local Rule 4.04(e). However, that order was less objectionable than Local Rule 4.04(e) because the district court order contained certain exceptions for attorney/client communications that are not present in Local Rule 4.04(e).

state circuit court chief judge had issued an identical administrative regulation, it would be doubtful that judge could claim qualified immunity to defend against a private remedial action filed in this Court under section 1983 of Title 42 of the United States Code. Local Rule 4.04(e) should be declared unconstitutional and put to rest in the same place where the pre-split United States Court of Appeals for the Fifth Circuit had previously sent virtually identical local rules in its 1980 en banc majority opinion in *Gulf Oil Co. v. Bernard,* 619 F.2d 459 (5th Cir. 1980) (en banc); *see* note 1, *supra.* Such local rules were not resurrected because the Supreme Court chose to affirm on non-constitutional grounds.

Local Rule 4.04(e) also violates the right to access to the courts under the Due Process Clause of the Fifth Amendment. The non-representative class members have a right to be heard and to notice as to the ongoings of litigation that may affect their interests. The United States Supreme Court in *Boddie v. Connecticut,* 401 U.S. 371, 375 (1971) explained:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.

> Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Class members also have a right to communicate with plaintiffs and their counsel to learn the status of the litigation and obtain other information relevant to them. "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.* at 377. The only way class members can exercise their right to be heard is if they know what is going on in the litigation.

In addition, non-representative plaintiffs have the right to make contributions to defray the necessary costs of litigation that enable their dispute to be resolved. While governments may impose costs to litigants, they may not utilize those costs as a means to deprive litigants of their right to have their disputes resolved in a meaningful manner in the monopoly forum of an Article III court. A local rule that effectively prohibits contributions from non-representative plaintiffs in litigation that is certain to have thousands of dollars of costs runs directly afoul of the right to access. This is especially the case in this ERISA litigation where the Congress has preempted state law remedies and for the claim at issue provided for exclusive Article III federal court jurisdiction.

Conclusion

Local Rule 4.04(e) should be declared facially unconstitutional.

Certificate of Conference with Opposing Counsel

I certify that I conferred with Timothy L. Porter of AT&T's Legal Department concerning this motion. Mr. Porter responded that he had only recently become aware of the complaint and AT&T had not yet formulated any position on this motion.

Barbara Slott Pegg, P.A.

BARBARA SLOTT PEGG
Fla. Bar No. 275352
13000 Sawgrass Village Circle,
Suite 11
Ponte Vedra Beach, Fl. 32082
(904) 285-8100
Fax (904) 285-8890

WINICKI LAW FIRM

/s/ Robert J. Winicki
ROBERT J. WINICKI
Fl. Bar No. 335381
11265 Alumni Way
Suite 201
Jacksonville, Fl. 32246
(904) 564-9955
Fax (904) 641-0760
Attorney for the Plaintiffs

[Certificate of Service Omitted]